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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 ANGELA WISE, on behalf of  
4 herself and all others  
5 similarly situated, et al.,

6 Plaintiffs,

7 v.

11 CV 7345 (WHP)

8 ENERGY PLUS HOLDINGS LLC,

9 Defendant.

10 New York, N.Y.  
11 March 23, 2012  
12 11:15 a.m.

13 Before:

14 HON. WILLIAM H. PAULEY III,

15 District Judge

16 APPEARANCES

17 MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ PC

18 Attorneys for Plaintiffs

19 BY: JEFFREY I. CARTON

20 DOUGLAS G. BLANKINSHIP

21 LOWENSTEIN SANDLER PC

22 Attorneys for Defendant

23 BY: ROBERT D. TOWEY

24 AURORA F. PARRILLA

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1 (Case called)

2 MR. BLANKINSHIP: Greg Blankinship and my colleague,  
3 Jeff Carton, for the plaintiff, your Honor.

4 MR. TOWEY: Good morning, your Honor. Robert Towey  
5 and Aurora Perrilla, from Lowenstein Sandler. And I also have  
6 with me today Jane Seely, general counsel of Energy Plus.

7 THE COURT: Good morning.

8 This is oral argument on your motion to dismiss. Do  
9 you want to be heard?

10 MR. TOWEY: Yes, please. Thank you, your Honor.

11 Your Honor, years ago, when I moved my law practice to  
12 my current firm, I told my clients that if they moved their  
13 cases with me, they'd receive the same reliable service, me,  
14 their legal entity. It's the same type of representation  
15 that's raised in this case against Energy Plus. Our firm's  
16 goal is to be competitive with other firms over the long run,  
17 like most businesses. We offer valuable rewards to our clients  
18 such as opportunities to partner with us in pro bono cases. We  
19 offer free CLE courses to in-house counsel, and, like other  
20 businesses, like Energy Plus, our firm acquires attorneys from  
21 the legal market. We incorporate these thoughts into our  
22 services that we provide and our rates vary from month to  
23 month. Clients' bills fluctuate; sometimes higher, sometimes  
24 lower.

25 THE COURT: But if, as alleged in this case, price is

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1 the most important consideration for energy consumers and  
2 Energy Plus' product is the same as its competitors' because  
3 electricity is electricity wherever you get it, couldn't the  
4 phrase "our goal is to be competitive over the long run"  
5 reasonably be read as a representation about price?

6 MR. TOWEY: No, your Honor. Whether that  
7 representation is made by a service provider, a manufacturer of  
8 widgets, or a lawyer trying to compete in the market for  
9 clients, the goal to be competitive is always the same. I  
10 can't think of any company, any supplier, or any service  
11 provider that doesn't have the goal to be competitive.

12 THE COURT: But there's a wide range in quality among  
13 lawyers and absolutely no variation in the quality of the  
14 electricity that comes through the wire. Right? Either it's  
15 110 or 220. And your client is selling electricity, not legal  
16 services.

17 MR. TOWEY: Your Honor, I would say to your Honor that  
18 one could try to draw that distinction with regard to any  
19 service or product but that when you focus on the words that  
20 are used, regardless of what industry, that the goal to be  
21 competitive is a general marketing goal and general statement  
22 of aspiration of any person, company, or provider who is trying  
23 to get customers and keep customers.

24 The difference here with regard to Energy Plus is that  
25 not only does Energy Plus provide energy, it also provides

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1 other rewards to its customers, and while the plaintiffs argue  
2 that those rewards have no moment and shouldn't be considered,  
3 that is one of the distinctions of Energy Plus from other  
4 competitors. Energy Plus, for example, partners with 150, or  
5 so, other airlines, hotels, and service providers and offers to  
6 its customers various ways to put its energy dollars to work so  
7 that while customers pay for energy service, they're also  
8 either earning frequent flier miles or earn those miles when  
9 they become a customer, or they earn reward privileges at  
10 restaurants and hotel chains. They can opt for a plan that  
11 allows them to put their energy savings to use for college  
12 savings. They can opt instead to have energy completely green  
13 so that the sources of energy come solely from green sources to  
14 the consumer. Those have value.

15           So while the goal is to be competitive, a general  
16 marketing goal, that particular statement also says that their  
17 goal is to be competitive over the long run while offering  
18 valuable rewards. And to me, the focus, at least with regard  
19 to that particular statement, which is challenged as puffery,  
20 is that it's indistinguishable from other cases and other  
21 words, marketing words that, frankly, I think, make the goal to  
22 be competitive pale by comparison. Words like "most  
23 dependable, long-lasting truck on the planet," "blazing fast,"  
24 "very high productive trades," "most cost effective prices,"  
25 "prices as low as possible," and even the word "competitive" in

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1 a case which the plaintiff cited which I think is, frankly,  
2 distinguishable as an antitrust case, Silverman, but even in  
3 that case, the word "competitive," product being competitive,  
4 and I think when you add the word "goal," I think it suggests,  
5 your Honor, you even further attenuate the word "competitive"  
6 from anything that could be deemed actionable.

7 So if your most dependable, long-lasting truck on the  
8 planet, instead you say it's your goal to be the most  
9 dependable, long-lasting truck on the planet, in either  
10 instance, that would be nonactionable puffery as was found with  
11 regard to that representation.

12 The same is true with regard to the offer of prices as  
13 low as possible. In that case, your Honor,  
14 manufacture/supplier said, "Our prices are as low as possible,"  
15 found to be nonactionable puffery. Put a qualifier on that,  
16 "our goal is to have prices as low as possible," I argue that  
17 that further attenuates any finding that that particular phrase  
18 or in our case the phrase "competitive" could be found to be  
19 actual puffery.

20 In every instance cited with regard to the language  
21 that's found to be nonactionable puffery, every manufacturer,  
22 every supplier of service was comparing their product to the  
23 market in in some way to attract customers, and in every  
24 instance those language uses were found to be nonactionable.

25 As to the plaintiffs' claim with respect to

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1 plaintiffs' use of the following wording, "Energy Plus offers a  
2 market rate product, which means we buy electricity every day  
3 on the open market, our approach is to purchase energy from  
4 each of these markets on a daily and monthly basis, which  
5 allows us to incorporate the most up-to-date energy costs from  
6 each market into our rates. As with all variable rate plans,  
7 your supply price may fluctuate on a monthly basis lower or  
8 higher to reflect the current state of each market and other  
9 factors."

10           Considering this market statement as a whole and in  
11 full context rather than as cherry-picked words as the  
12 plaintiffs do in their brief, there is nothing misleading as a  
13 matter of law about this statement. First, Energy Plus  
14 explicitly defines market rate in this very statement to mean  
15 we, Energy Plus, buy electricity every day on the open market.

16           Second, Energy Plus expressly discloses that it  
17 incorporates the most up-to-date energy costs into its rates  
18 along with other factors.

19           Finally, Energy Plus advises customers that as with  
20 all variable rate plans, the price fluctuates on a monthly  
21 basis lower or higher to reflect the market and those other  
22 factors.

23           This disclosure specifically satisfies the  
24 requirements of GBL 349-e(7), which requires that all variable  
25 rate charges shall be clearly and conspicuously identified in

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1 marketing material. The act does not require energy suppliers  
2 to explain the basis or effect of its variable charges or how  
3 much they will vary or why, as the plaintiff suggests.  
4 Instead, the plaintiffs ask this Court to rewrite this  
5 legislation and to impose disclosure obligations greater than  
6 the law itself.

7 The plaintiffs equate Energy Plus' disclosure and  
8 position in this motion with regard to the clear and  
9 conspicuous disclosure of its variable rate product to the  
10 argument of Greek philosophers, and I confess I chuckled when I  
11 read that, and surely it was meant as a compliment. However,  
12 some may credit Yogi Berra, but actually it was the same Greek  
13 philosophers who were credited with the phrase "It is what it  
14 is," and that applies in this instance to a variable rate  
15 product. There is simply nothing more specific that a supplier  
16 with a variable rate energy product must disclose with regard  
17 to its rates other than the very fact that it's variable.

18 THE COURT: I think I understand your argument there.  
19 Let me ask you this. Is Energy Plus challenging the  
20 plaintiffs' allegations regarding whether the allegedly  
21 deceptive statements caused injury?

22 MR. TOWEY: Yes.

23 THE COURT: Anything further?

24 MR. TOWEY: Yes.

25 THE COURT: I'd like to hear from your adversary.

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1 MR. TOWEY: Yes, your Honor.

2 With regard to that very issue, which ties very much  
3 into the materiality issue, the complaint fails to connect the  
4 plaintiffs' status as former customers of Energy Plus with any  
5 exposure to the marketing statements.

6 THE COURT: That could be easily cured though by a  
7 repleading, couldn't it?

8 MR. TOWEY: It could, although your Honor was not shy  
9 about making that same ruling in Bildstein I, and, frankly, I'd  
10 rather see the plaintiffs put up or shut up on that issue.  
11 These were customers for very short periods of time, and all  
12 they say in their pleading is that they were customers and now  
13 the rates were too much. But there's no linkage between those  
14 two claims in terms of exposure to any specific marketing  
15 statement or certainly any change in their consumer conduct,  
16 and nor can they rely upon broad based allegations that somehow  
17 there's this amorphous group out there that did rely upon it or  
18 changed their conduct based upon exposure to those very  
19 statements.

20 THE COURT: All right, Mr. Towey.

21 MR. TOWEY: Lastly is the unjust enrichment claim.

22 THE COURT: I don't need to hear you on that.

23 MR. TOWEY: Thank you, your Honor.

24 THE COURT: Thank you.

25 Mr. Blankinship.



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1 MR. BLANKINSHIP: Thank you, your Honor.

2 This case is simple, your Honor. Energy Plus lures  
3 consumers with promises of frequent flier rewards and same  
4 reliable service they've already enjoyed and any reasonable  
5 consumer would jump at that chance so long as the rates were  
6 the same or at least competitive. To that end, Energy Plus  
7 uniformly states that it offers a market rate, and any consumer  
8 would understand that to mean that Energy Plus' rates are  
9 consistent with those in the market.

10 To reinforce that impression, Energy Plus makes a  
11 series of representations, the effect of which, when taken in  
12 context and in totality, is to impress upon consumers the  
13 notion that Energy Plus actively seeks out the best and most  
14 up-to-date market prices so that it can incorporate them into  
15 that rate. To that end, Energy Plus represents that it offers  
16 a market rate product, which means you buy electricity every  
17 day on the open market. They claim their approach to buy  
18 energy on the market which allows us to incorporate the most  
19 up-to-date energy costs into our rate. They say the rates  
20 reflect the current state of each market and that their goal is  
21 to be competitive over a long run.

22 Any reasonable juror could conclude that these  
23 representations taken in totality would lead a consumer to  
24 understand that the rates that they will be getting from Energy  
25 Plus will be commensurate with those available in the market,

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1 certainly not two to three times as much. And the specific  
2 notion, the specific representation that their rates reflect  
3 those in the market is belied by the fact that Energy Plus'  
4 rates actually increase or remain steady when the rates in the  
5 market decline. That's a concrete allegation in the complaint  
6 as to a misrepresented statement. And, of course, Energy Plus  
7 fails to inform consumers that its rates are substantially  
8 higher than the market, that its rates do not reflect the  
9 market, and that the rates are not, in fact, competitive at  
10 all.

11 Of course, your Honor, we're here on the motion to  
12 dismiss and whether reasonable consumers are deceived is  
13 normally a question of fact to be left to a properly instructed  
14 jury. Under Twombly, so long as it's plausible that reasonable  
15 consumers would be misled by defendant's misrepresentations and  
16 omissions into believing that Energy Plus' rates were  
17 reflective of the market and competitive rather than two to  
18 three times the going rate, the motion should be denied.

19 THE COURT: Why should the equitable remedy of unjust  
20 enrichment be available?

21 MR. BLANKINSHIP: Your Honor, we pled unjust  
22 enrichment in the alternative. Under 349-d(8), any violation  
23 of Section 349 invalidates the contract.

24 THE COURT: And that would entitle you to statutory  
25 damages, wouldn't it?

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1 MR. BLANKINSHIP: It certainly would, your Honor.

2 THE COURT: How would it entitle you to unjust  
3 enrichment?

4 MR. BLANKINSHIP: Your Honor, the violations we've  
5 alleged in the complaint, namely 349-d(3), use of unfair and  
6 deceptive practices, and d(7), failure to properly disclose  
7 variable charges, those would cause injury to a plaintiff which  
8 is the requirement under 349-d to be able to bring a claim. We  
9 certainly do expect to recover on this basis on behalf of the  
10 class.

11 As discovery progresses and the case moves on, it may,  
12 as unlikely as it is, end up that there are other violations of  
13 349-d that don't necessarily cause in the same direct way an  
14 injury to consumers, but that would nonetheless invalidate the  
15 contract, thus allowing for an unjust enrichment claim. We're  
16 certainly not intending to seek recovery under both claims, but  
17 we would suggest that it's a little early in the litigation to  
18 dismiss the unjust enrichment claim.

19 THE COURT: All right. Anything further?

20 MR. BLANKINSHIP: Your Honor, I would just like to  
21 address the issue of 349-d and whether it's sufficient to  
22 clearly and conspicuously identify variable charges by saying  
23 "all of our charges vary," and that's all.

24 THE COURT: 349 doesn't require that they be  
25 explained, does it?

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1 MR. BLANKINSHIP: Your Honor.

2 THE COURT: It requires disclosure.

3 MR. BLANKINSHIP: It does require disclosure, your  
4 Honor.

5 THE COURT: Not explanation.

6 MR. BLANKINSHIP: Your Honor, I respectfully disagree.  
7 I think when the statute says you have to clearly and  
8 conspicuously identify your variable charges, one can't say  
9 that all of our charges are variable, and that was clearly not  
10 the intent of the legislature. If you look at the sponsoring  
11 memo for 349-d, that memo indicates that the purpose of the  
12 statute was to ensure fair marketing by ESCO's and to ensure  
13 that consumers were able to make informed decisions as to what  
14 their rates were going to be. And to that end, the sponsoring  
15 memo also identifies the use of variable charges as one of the  
16 mechanisms by which consumers are unjustly charged exorbitant  
17 rates. To rule that one could identify variable charges by  
18 saying all of our charges vary would be to eviscerate the  
19 purpose of that statute.

20 Similarly, the Public Service Commission, in issuing  
21 implementing regulations pursuant to 349-d, clearly stated that  
22 it imposed additional obligations to make disclosures in simple  
23 and clear language, and it requires, regarding price of  
24 electricity, and that all variable rates be identified. I  
25 would suggest that that indicates that the legislature intended

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1 more than just a reductive statement that our rates vary. It  
2 certainly doesn't protect consumers from the potential ravages  
3 of improperly charged variable rates.

4 THE COURT: I think I understand your arguments.  
5 Thank you, Mr. Blankinship.

6 MR. BLANKINSHIP: Thank you, your Honor.

7 THE COURT: Anything further, Mr. Towey?

8 MR. TOWEY: Just briefly, your Honor.

9 Again, just focusing on the issue of puffery and the  
10 goal of being competitive, whether there is an energy company  
11 or a runner or a race car driver or a lawyer looking to be  
12 competitive in a market, there's always going to be a top, a  
13 bottom, and a middle range. The goal of being competitive  
14 doesn't mean you have to be by definition anywhere in there.  
15 You could be the fastest, the slowest, but if your goal is to  
16 be the fastest, you do your best to be the fastest. Does it  
17 mean you'll win every race? No. And again, it goes back to  
18 the intentional use of the word "goal," as a corporate goal as  
19 opposed to a commitment that you are the lowest and even in  
20 instances where companies have said we are the lowest and  
21 courts have said even that is not actionable puffery.

22 The other arguments, your Honor, are what they are.  
23 The puffery argument really requires this Court to look at this  
24 language and to make a judgment call, and I believe there's a  
25 substantial body of case law that supports the motion to

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1 dismiss on all of the issues, but especially on the puffery  
2 issue.

3 THE COURT: Thank you, Mr. Towey.

4 This Court has reviewed all the parties' motion papers  
5 and considered their arguments and I'm prepared to rule.

6 Plaintiffs Angela Wise and Gideon Romm bring this  
7 putative class action on behalf of New York consumers who  
8 purchased household electricity from defendant Energy Plus  
9 Holdings LLC, between October 18, 2008 and the present.

10 Plaintiffs assert claims under the New York General Business  
11 Law sections 349 and 349-d and a claim for unjust enrichment.  
12 Energy Plus moves to dismiss.

13 On a motion to dismiss, this Court accepts all factual  
14 allegations in the complaint as true and construes all  
15 reasonable inferences in plaintiff's favor. ECA Local 134 IBEW  
16 Joint Pension Trust of Chicago v. J.P. Morgan Chase & Co., 553  
17 F.3d 187, 196 (2d Cir. 1989). Nevertheless, "a complaint must  
18 contain sufficient factual matter, accepted as true, to state a  
19 claim for relief that is plausible on its face." Ashcroft v.  
20 Iqbal, 129 S.Ct. 1937, 1949 (2009).

21 To state a claim under 349 or 349-d, a plaintiff must  
22 plead, one, that the defendant's challenged act, practice was  
23 consumer-oriented, two, that it was misleading or deceptive in  
24 a material way, and, three, that the plaintiffs suffered injury  
25 as a result of the deceptive practice. Bildstein v. MasterCard

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1 Int'l, Inc., 329 F.Supp.2d 410, 413 (S.D.N.Y. 2004).

2 A deceptive act or practice under sections 349 and  
3 349-d is one that is "likely to mislead a reasonable consumer  
4 acting reasonably under the circumstances." Oswego Laborers'  
5 Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 26  
6 (1995). A deceptive practice is material if it "involves  
7 information that is important to consumers and, hence, likely  
8 to affect their choice of, or conduct regarding, a product."  
9 Bildstein, 329, F.Supp.2d at 414.

10 Puffery, however, is not actionable. Verizon  
11 Directors Corp. v. Yellow Book, Inc., 309 F.Supp.2d 401, 405-06  
12 (E.D.N.Y. 2004). "Puffery includes generalized or exaggerated  
13 statements which a reasonable consumer would not interpret as a  
14 factual claim upon which he could rely." Fink v. Time Warner  
15 Cable, 810 F.Supp.2d 633, 644 (S.D.N.Y. 2011). And while it is  
16 appropriate to dismiss claims of deceptive business practices  
17 in certain circumstances, generally "whether defendants'  
18 conduct was deceptive or misleading is a question of fact."  
19 Sims v. First Consumers National Bank, 303 A.D.2d 288, 289 (1st  
20 Dep't 2003).

21 Energy Plus argues that the challenged statements are  
22 either puffery or are not misleading. In cases involving  
23 deceptive marketing material, the "entire mosaic should be  
24 viewed rather than each tile separately." Time Warner Cable,  
25 Inc. v. DirecTV, Inc., 475 F.Supp.2d 299, 305 (S.D.N.Y. 2007).

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1 Viewed together the allegedly deceptive statements plausibly  
2 may be read by a reasonable consumer as a representation that  
3 Energy Plus' prices are at least relatively comparable both to  
4 competitors' prices and to prevailing market rates. Given that  
5 the plaintiffs have alleged that Energy Plus' rates in fact are  
6 two to three times greater and that Energy Plus' rates rise or  
7 remain steady during some periods when market prices decline,  
8 the plaintiffs have stated a plausible claim that the  
9 challenged statements are deceptive. Further, Energy Plus'  
10 failure to disclose the alleged truth about its prices  
11 plausibly renders its other statements misleading.

12 Accordingly, the plaintiffs have stated a claim based on Energy  
13 Plus' omissions. See *Henry v. Rehab Plus, Inc.*, 404 F.Supp.2d  
14 435, 445 (E.D.N.Y. 2005).

15 The plaintiffs also adequately allege that Energy  
16 Plus' misstatements are material by alleging that price is the  
17 most important consideration for energy consumers. The  
18 plaintiffs need not plead reliance on Energy Plus' statements.  
19 *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000). However,  
20 the plaintiffs have failed to adequately plead that Energy  
21 Plus' misstatements caused their injury because there's no  
22 allegation that the named plaintiffs believed that they would  
23 be charged less than they actually were. See *Stutman*, 95  
24 N.Y.2d at 30. Accordingly, the plaintiffs' sections 349 and  
25 349-d(3) claims are dismissed without prejudice to replead that



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1 Energy Plus' misstatements caused their injury.

2           With regard to plaintiff's allegation that Energy Plus  
3 has failed to clearly and conspicuously identify its variable  
4 charges as required by Section 349-d(7), Energy Plus' motion to  
5 dismiss is granted. The statute requires that variable charges  
6 be "identified," not that they be "explained," or that their  
7 "basis" be identified. Section 349-d elsewhere makes a  
8 distinction between the obligation to identify and the  
9 obligation to explain. See N.Y. General Business Law Section  
10 349-d(2). Further, there is little in the legislative history  
11 of the statute or in the Public Service Commission's  
12 regulations (known as the Uniform Business Practices) to  
13 clearly suggest that Section 349-d(7) is meant to address the  
14 content of an energy supply company's identification of its  
15 variable charges rather than the plain fact that they are  
16 variable. Most of the references to Section 349-d(7) and the  
17 legislative history merely mimic the language of the statute.  
18 In any event, where, as here, the proper interpretation of a  
19 statute is "dependent only on accurate apprehension of  
20 legislative intent" rather than on an agency's specialized  
21 knowledge or expertise, an agency's interpretation of the  
22 statute is afforded little weight. *Kurcsics v. Merchants*  
23 *Mutual Insurance Co.*, 403 N.E.2d 159, 163 (N.Y. 1980). And  
24 while the purpose of Section 349-d is to protect consumers and  
25 allow them to make informed decisions, it is not unreasonable

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1 to think that the New York legislature believed that those  
2 roles could be advanced when a consumer is clearly made aware  
3 that a particular charge is variable.

4           There is no allegation here that Energy Plus'  
5 statements are buried in fine print, illegible, or otherwise  
6 hidden from consumers, and, for whatever the statements lack in  
7 detail, they plainly identify that Energy Plus' supply prices  
8 are variable. Under these circumstances, the plaintiffs have  
9 failed to state a claim that Energy Plus violated its  
10 obligation to clearly and conspicuously identify its variable  
11 charges.

12           Finally, Energy Plus' motion to dismiss the  
13 plaintiffs' unjust enrichment claim is granted. "Unjust  
14 enrichment is an equitable claim that is unavailable where an  
15 adequate remedy at law exists." Fed. Treasury Enter.  
16 Sojuzplodoimport v. Spirits Int'l N.V., 400 F.App'x 611, 613  
17 (2d Cir. 2010). Here, the plaintiffs have an adequate remedy  
18 at law under the consumer protection statutes. Thus, their  
19 unjust enrichment claim is dismissed.

20           This constitutes the decision of this Court. I will  
21 enter a short order on the docket. You have a discovery  
22 schedule that's in place. So continue to proceed with it, and  
23 to the extent that the plaintiff repleads on the reliance issue  
24 as directed by this Court, that amended complaint should be  
25 filed within two weeks. And because I've dismissed certain

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1 claims, don't replead them.

2 Anything further?

3 MR. TOWEY: No. Thank you, your Honor.

4 MR. BLANKINSHIP: No. Thank you, your Honor.

5 THE COURT: All right. Have a good weekend.

6 (Proceedings adjourned)